Pean Kar Fu v Malayan Banking Bhd (Toh Boon Pin, intervener)

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24 (L) 772 OF 2002
JEFFREY TAN J
2 SEPTEMBER 2003

Civil Procedure — Discovery — Inspection of documents — Banker's books — Whether right existed to bring separate action against bank to reveal book entries — Whether alternative method of discovery provided — Whether application should be made to trial court — Banker's Evidence Act 1949 s 7

The Yong and Toh family held the entire issued share capital of T & Y Treasures Time Sdn Bhd ('T & Y'). On 4 April 2001, the Yong family filed a petition ('petition') against Toh Boon Pin, Toh Boon Teh, and T&Y, for relief under s 181 of the Companies Act. On 2 May 2001, the Johore Baru High Court appointed an interim receiver & manager for T & Y and subsequently with the parties' consent, that court appointed the official receiver as the interim receiver & manager of T & Y. T & Y maintained a banking account with the defendant. The plaintiff now applies amongst others, for an order that the defendant at its own cost, supply the plaintiff and/or the plaintiff's solicitors, agent and/or representative, the cheque image and/or photocopies of all the cheques that had been issued by T & Y from that account as listed in the schedule of the originating summons filed herein. Counsel for the plaintiff submitted that under s 7(1) of the Bankers Evidence Act 1949 ('the Act'), a judge may order the inspection of a banker's book and that under s 8 of the Act, a judge may order the bank to pay the costs of a s 7 application. Counsel for the defendant submitted that cheques were not banker's book within the definition of s 2 of the Act and accordingly could not be the subject of an order for inspection pursuant to s 7 of the Act. The defendant's counsel also argued, that the court hearing the petition should make any order under s 7 of the Act, and that the jurisdiction to make such order lies with the Johore Bary High Court and not the Muar High Court. Miss Julie Lim for the intervener expressed similar views.

Held, dismissing the application:

(1) Section 7 is to enable parties to inspect banker's books and take copies of them. It is to assist discovery and has not altered the principles of law or practice with regard to discovery. Section 7 empowers the court to order the inspection and the taking of copies of entries in a banker's book, in the pre-trial discovery process (see para 9); *Perwira Habib Bank v Dipri Trading Sdn Bhd & 3 Ors* [1994] 2 CLJ 83 followed.

(2) Section 7 has not brought about a right to bring a separate action against a bank to reveal its book entries, and or to take the discovery process away from the court before whom the legal proceeding is being held. Section 7 has not provided an alternative method of discovery. Discovery remains in the domain of the trial court. In the instant case, application was made to the Muar High Court which had no jurisdiction whatsoever over the petition. This application for a s 7 order should have been made

to the trial court. Further, it was the court presiding over the legal proceeding that was in the best position to determine the issues and or questions in the cause or matter, and in the best position to rule on the orders in relation to discovery (see para 9); *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd* [1996] 1 CLJ 812 and *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26 distinguished.

[**Bahasa Malaysia summary**

Keluarga Yong dan Toh memegang keseluruhan syer berbayar yang dikeluarkan oleh T & Y Treasures Sdn Bhd ('T & Y). Pada 4 April 2001, keluarga Yong telah memfailkan petisyen ('petisyen') terhadap Toh Boon Pin, Toh Boon Teh dan T & Y bagi relif di bawah s 181 Akta Syarikat. Pada 2 May 2001, Mahkamah Tinggi Johor Bahru telah melantik penerima dan pengurus bagi T & Y dan kemudiannya, dengan persetujuan pihak-pihak, mahkamah tersebut telah melantik pegawai penerima sebagai penerima dan pengurus interim bagi T & Y. T & Y mempunyai akaun bank dengan defendan. Plaintif kini memohon antara lain, untuk perintah agar defendan atas kosnya sendiri, membekalkan kepada plaintif dan/atau peguam plaintif, agen dan/atau wakilnya 'cheque image' dan/atau salinan fotokopi kesemua cek-cek yang telah pernah dikeluarkan oleh T & Y di bawah akaun tersebut seperti yang disenaraikan dalam jadual saman pemula yang difailkan disini. Peguam plaintif berhujah bahawa di bawah s 7(1) Akta Buku Banker (Keterangan) 1949 ('Akta tersebut') hakim boleh memerintahkan pemeriksaan buku banker dan di bawah s 8 Akta tersebut, hakim boleh memerintahkan bank untuk membayar kos permohonan di bawah s 7 Akta tersebut. Peguam defendan sebaliknya berhujah bahawa cek-cek bukanlah buku banker dalam lingkungan definisi s 2 Akta tersebut dan oleh itu tidak boleh dijadikan subjek bagi perintah pemeriksaan menurut s 7 Akta tersebut. Peguam defendan turut berhujah bahawa mahkamah yang mendengar petisyen seharusnya membuat perintah di bawah s 7 Akta tersebut dan bidang kuasa membuat perintah sedemikian terletak pada Mahkamah Tinggi Johor Bahru dan bukannya Mahkamah Tinggi Muar. Cik Julie Lim bagi pencelah melahirkan pandangan yang sama.

Diputuskan, menolak permohonan:

(1) Seksyen 7 adalah untuk membenarkan pihak-pihak memeriksa buku-buku bank dan membuat salinan. Ianya adalah untuk membantu penzahiran dan tidak mengubah prinsip undang-undang atau praktis berkenaan dengan penzahiran. Seksyen 7 membenarkan mahkamah memerintah pemeriksaan dan pengambilan salinan-salinan catatan dalam buku banker dalam proses penzahiran pra-perbicaraan (lihat perenggan 9); *Perwira Habib Bank v Dipri Trading Sdn Bhd & 3 Ors* [1994] 2 CLJ 83 diikut.

(2) Tetapi s 7 tidak membawa hak untuk membawa tindakan berasingan terhadap bank untuk mendedahkan catatan-catatan dalam bukunya, dan mengeluarkan proses penzahiran daripada mahkamah dimana prosiding undang-undang sedang dijalankan. Seksyen 7 tidak memberi kaedah alternatif kepada penzahiran. Penzahiran kekal sebagai domain

mahkamah perbicaraan. Dalam kes ini, permohonan telah dibuat ke Mahkamah Tinggi Muar yang tidak mempunyai sebarang bidang kuasa terhadap petisyen. Permohonan untuk perintah s 7 sepatutnya dibuat di mahkamah perbicaraan. Tambahan lagi, mahkamah yang mendengar prosiding undang-undang berada dalam kedudukan terbaik untuk menentukan isu-isu dan atau persoalan dalam tindakan atau perkara, dan berada dalam kedudukan terbaik untuk membuat perintah-perintah berkenaan penzahiran (lihat perenggan 9); *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd* [1996] 1 CLJ 812 dan *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26 dibeza.]

Notes

For cases on inspection of documents, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2079–2082.

Cases referred to

Al-Ani v Shubber 27 May 1999, Court of Appeal (Civil Division) (refd)
Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd [1996] 1 CLJ 812 (distd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1977] 2 MLJ 26 (distd)
Norwich Pharmacal Co and Ors v Commissioners of Customs and Excise [1973] 2 All ER 943 (refd)
Perwira Habib Bank Malaysia Berhad v Dipri Trading Sdn Bhd & 3 Ors [1994] 2 CLJ 83 (folld)
R v Bono (1913) 29 TLR 635 (refd)
Williams v Summerfield [1972] 2 QB 512 (refd)
Williams v Williams [1987] 3 All ER 257 (refd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 ss 2, 7(1), 8
Bankers' Book Evidence Act 1879 [UK] ss 7, 9(2)
Banking and Financial Institutions Act 1989 s 99
Rules of the High Court 1990 [Brunei]
Companies Act s 181

Mogan Karupiah for the plaintiff.
Shahareen Begum (TK Lim & Co)for the defendant.
Julie Lim (Julie Lim, Vasanthan & Co) for the intervener.

Jeffrey Tan J:

[1] This is an application by the plaintiff for the following orders:

(1) Defendan diperintahkan membekalkan kepada plaintif dan atau peguam plaintif dan atau ejen plaintif dan atau wakil plaintif, 'cheque image' dan atau sesalinan fotostat kesemua cek-cek (depan dan belakang) yang telah dikeluarkan oleh Syarikat T&Y Treasures Time Sdn Bhd di bawah akaun No 001–039–122–818, dengan defendan, seperti yang disenaraikan di dalam jadual di bawah saman pemula disini;

(2) Defendan diperintahkan membekalkan 'cheque image' dan atau sesalinan fotostat cek-cek yang disenaraikan di jadual tersebut, kepada plaintif atau peguam plaintif atau ejen atau wakil plaintif dalam masa tujuh (7) hari selepas disampaikan dengan perintah mahkamah yang akan dibuat disini;

(3) Perbelanjaan 'cheque image' dan atau fotostat cek-cek tersebut dan pembekalannya kepada plaintif atau peguamcaranya atau ejennya atau wakilnya, ditanggung oleh defendan;

(4) Kos permohonan ini dibayar oleh defendan kepada plaintif serta merta;

(5) Lain-lain perintah yang difikirkan sesuai dan manfaat oleh mahkamah yang mulia ini.

[2] In relation to the background facts, and the following is not in dispute, Mr. Mogan Karupiah for the plaintiff related that (a) the entire issued share capital of T & Y Treasures Time Sdn Bhd ('T & Y') are held by members of the Yong family and Toh family, (b) the plaintiff and her husband are members of the Yong family and they jointly hold 30,000 ordinary shares of RM1 each out of the total issue share capital of RM100,000, (c) sometime in May 2001 [it was on 4 April 2001] the Yong family filed a petition (Johore Baru High Court 26 February 2001) ('petition') against Toh Boon Pin, Toh Boon Teh, and T & Y, for relief under s 181 of the Companies Act 1965, and on 2 May 2001 the High Court at Johore Baru appointed one Koh Kheng Min as interim receiver & manager of T & Y, (d) on 16 February 2001 and with the consent of the parties, the High Court at Johore Bahru appointed the official receiver as the interim receiver & manager of T & Y, (e) the aforesaid consent order dated 16 May 2001 is still valid and binding on the parties, (f) T & Y maintained a banking account (No 001–039–122–818) with the defendant, (g) the plaintiff applied to the defendant for copies of cheques drawn on the said account, (h) on 4 March 2002, the official assignee gave his consent to the defendant to release copies of the said cheques to the plaintiff, (i) on 10 May 2002, the defendant released copies of 17 but not the other cheques despite the several requests of the plaintiff.

[3] In relation to the applicable law, Mr Karupiah submitted that under s 7(1) of the Bankers Books (Evidence) Act 1949 ('the Act') a judge may order the inspection of a banker's book, and that under s 8 of the same Act a judge may order the bank to pay the costs of a s 7 application. Counsel drew the attention of the court to s 99 of the Banking and Financial Institutions Act 1989, and said that secrecy was not a sufficient reason to withhold copies of the said cheques from the plaintiff, as the official assignee had given permission for the release of the same. Counsel then referred to *Perwira Habib Bank Malaysia Berhad v Dipri Trading Sdn Bhd & 3 Ors* [1994] 2 CLJ 83 and *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd* [1996] 1 CLJ 812, but said that it was held in *Norwich Pharmacal Co and Ors v Commissioners of Customs and Excise* [1973] 2 All ER 943 that the person against whom discovery is sought is under a duty to assist the person who has been wronged by giving him full information.

[4] Miss Shahareen Begum for the defendant was quick to answer that cheques are not bankers' books within the definition of s 2 of the Act.

Counsel referred to *Williams v Williams* [1987] 3 All ER 257, at p 261, where it was indeed held by the English Court of Appeal per Sir Donaldson MR that paid cheques and pay-in slips retained by a bank after the conclusion of a banking transaction to which they relate are not 'bankers' books' within the definition of s 9(2) (which is in *pari materia* with s 2 of the Act) of the Bankers' Book Evidence Act 1879 and accordingly cannot be the subject of an order for inspection pursuant to s 7 (which is in *pari materia* with s 7 of the Act) of the 1879 Act. Counsel argued, that the court hearing the petition should make any order under s 7, and that the jurisdiction to make such order lies with that court and not this court. *Norwich* must be distinguished, she said. 'This is not any discovery to identity wrongdoers.' Copies of the said cheques could be obtained in the petition proceedings, and through the receiver & manager who should make the application himself and not delegate the task to the plaintiff. Counsel said that the defendant had mistakenly released copies of 17 cheques to the plaintiff. Miss Julie Lim for the intervener expressed a similar view that s 7 of the Act is not any provision providing for an independent course of action. Mr Morgan made no further legal submission, but said that T & Y was paralysed by the appointment of the receiver and manager who had not done anything to assist the petitioner.

[5] Rightly so, there was no disagreement on the power of the court to order the inspection and or the taking of copies of entries in a bankers' book. That power is clearly found in s 7 of the Act, which reads as follows:

> (1) On the application of any party to a legal proceeding the court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.
>
> (2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three days before the same is to be obeyed unless the court or judge otherwise directs.

[6] And that power was exercised in *Perwira Habib Bank Malaysia Bhd v Dipri Trading Sdn Bhd & 3 Ors,* where it was held by Abdul Malek Ahmad J, as he then was, that an application under s 7 can be made for trial purposes as well as for interlocutory matters [see *Al-Ani v Shubber* 27 May 1999, Court of Appeal (Civil Division) where the order for the production of the banker's books was made in aid of the freezing order — an order requiring the defendant to make full disclosure of his assets], and that it was 'necessary for the inspection to be done for the further conduct of these proceedings'.

[7] That power was not exercised in *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd,* where it was held by the registrar that for a s 7 order to be made there must be a separate legal proceeding in existence. Dismissing the appeal, Roberts CJ (Brunei) enunciated:

> The Act, which is based on the UK Bankers' Books (Evidence) Act, is designed for the protection of bankers. Its main purpose is to enable copies of entries in bankers' books to be received as prima facie evidence of that entry.
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> Section 6 of the Act, indeed, provides that an officer of the bank shall not, in any legal proceedings to which the bank is not a party be compellable to produce any bankers' books if the contents of these can be proved under the Act.

The phrase 'legal proceeding' is used in s 7 of the Act. Before a court has power to order the inspection and taking of copies of any entries in a banker's book, there must be an application by a 'party to a legal proceeding'.

The plaintiff is, in a sense, a party to legal proceedings. These are defined in the Act, as meaning any civil or criminal proceeding or enquiry in which evidence is, or may be, given and includes an arbitration. I have no doubt that the wide terms of this definition will include an originating summons or motion taken out under the Brunei Rules of the High Court 1990 ('the BRHC') or otherwise.

The plaintiff, however, is seeking to use against the bank, an Act which was passed for the benefit of banks to enable them to produce copies of the entries in their books, instead of the books themselves, in order to avoid the disruption of the bank which would result if the original books had to be taken to court.

It is clear from *Williams v Summerfield* [1972] 2 QB 512, that, as Lord Widgery LCJ said, at p 518:

> 'The effect of the judgment in *Bono's* case *(R v Bono* (1913) 29 TLR 635) and other authorities is that the courts have set their face against s 7 being used as a kind of searching inquiry or fishing expedition beyond the ordinary rules of discovery.
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> In civil proceedings the normal approach to the use of s 7 is that documents which would be discoverable, under the ordinary rules applicable thereto, are not to be disclosed by a side wind, as it were, by the application of s 7.'

Lord Widgery further deprecated (in relation to criminal proceedings) the use of an application under s 7 as a fishing expedition in the hope of finding some material upon which a charge could be hung. The same principle will, in my judgment, apply to civil proceedings as well.

Although s 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.

The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself.

Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank.

In summary, the applicant, before an order is made in his favour under s 7 of the Act for the inspection of a ledger kept by the bank, must first show that he is a party to separate legal proceedings.

[8] The application in *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd,* failed basically because the plaintiff was not a party to a legal proceeding. It failed also because it was held that the Act is not intended to provide an alternative method of discovery. That the Act is not so intended was also observed in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1977] 2 MLJ 26, where Arulanandom J said (at p 28):

> The main object of the provisions of the Act is to enable evidence to be procured and given and to relieve bankers from the necessity of attending and producing their books. They do not give any new power of discovery or alter the principles of law or the practice with regard to discovery.

[9] It should be pointed out that the said applications in *Chan Swee Leng v Hongkong and Shanghai Banking Corp Ltd* and *Goh Hooi Yin v Lim Teong Ghee & Ors* were made to the court before whom the legal proceeding was being held or taken. Those applications were not taken to another court. But in the instant case, application was made to a court, to this court, which has no jurisdiction whatsoever over the said petition. As said, s 7 is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them. Section 7 is to assist discovery. Section 7 has not altered the principles of law or practice with regard to discovery which is the pre-trial device to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Section 7 empowers the court to order the inspection and the taking of copies of entries in a banker's book, in the pre-trial discovery process. But that is not to say that s 7 has brought about a right to bring a separate action against a bank to reveal its book entries, and or to take the discovery process away from the court before whom the legal proceeding is being held or taken. Section 7 has not provided an alternative method of discovery. Discovery remains in the domain of the trial court. This application for a s 7 order should have been made to the trial court. After all, it is the court presiding over the legal proceeding that is in the best position to determine the issues and or questions in the cause or matter, and in the best position to rule on the orders in relation to discovery. For these reasons, this application is dismissed with costs.

Application dismissed.

Reported by R Lalitha